Saint Louis University Public Law Review

Volume 31
Number 1 *A New Era for Plea Bargaining and Sentencing?: The Aftermath of Padilla v. Kentucky (Volume XXXI, No. 1)*

Article 6

2011

Transporting Padilla to Deportation Proceedings: A Due Process Right to the Effective Assistance of Counsel

Stephen H. Legomsky
Washington University in St. Louis School of Law, legomsky@wulaw.wustl.edu

TRANSPORTING *PADILLA* TO DEPORTATION PROCEEDINGS: A DUE PROCESS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

STEPHEN H. LEGOMSKY*

INTRODUCTION

In the immigration sphere, issues as to the effectiveness of counsel typically arise in two contexts. In one context, a noncitizen claims that counsel was ineffective during the course of deportation proceedings.[1] In the other, a noncitizen criminal defendant claims that counsel's deficient advice led the noncitizen to plead guilty to a crime that, in turn, put him or her at risk of deportation.

The Supreme Court's landmark decision in *Padilla v. Kentucky*[2] transformed that second terrain. Before *Padilla*, deportation was merely a "collateral" consequence of a criminal conviction; because deportation was not part of the criminal sentence, it was not held to be a "direct" consequence.[3] That distinction stemmed from the traditional view that a deportation order is a

* The John S. Lehmann University Professor, Washington University School of Law. Since October 2011, the author has been on leave as Chief Counsel of U.S. Citizenship and Immigration Services (USCIS), U.S. Department of Homeland Security. This article was written, submitted, accepted for publication, and posted on the Social Science Research Network before the author's appointment at USCIS. The views expressed are solely those of the author in his personal capacity, not those of the agency.

1. Before 1996, the statute distinguished "exclusion" proceedings, in which the government sought to bar a noncitizen from entering the United States, from "deportation" proceedings, in which the government sought to expel a noncitizen who had already entered the country. In 1996, Congress replaced both "exclusion" and "deportation" with the new statutory term "removal." *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1229a (2006)) (adding language regarding removal proceedings to determine inadmissibility or deportability to Immigration and Nationality Act section 240). In this Article, I use the term "deportation" to refer only to the latter kind of proceeding.

2. 130 S. Ct. 1473 (2010).

3. For this reason, the lower courts have uniformly rejected requests to withdraw guilty pleas based on the trial judge's failure to disclose the potential deportation consequences of their pleas, absent statutory requirements to the contrary. *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 516–17 (2007).

civil penalty rather than a criminal punishment.[4] The difference was critical because lower courts had divided over whether counsel's erroneous advice concerning the collateral consequences of a guilty plea, or counsel's failure to advise about those consequences at all, breaches the defendant's Sixth Amendment right to effective assistance of counsel.[5]

In *Padilla*, seven of the nine Justices held that erroneous advice concerning the deportation consequences of a guilty plea can constitute ineffective assistance of counsel for Sixth Amendment purposes.[6] The same seven Justices held that the Sixth Amendment also affirmatively obligates defense counsel to advise a noncitizen defendant that pleading guilty *might* lead to deportation.[7] The five-Justice majority went a step further, requiring defense counsel to spell out deportation consequences more precisely when they are clear.[8]

To reach its decision, the *Padilla* Court had to revisit the longstanding judicial dogma that deportation is purely a "collateral" consequence.[9] As the Court discovered, deportation cannot be so neatly separated from the criminal sentence. Rather, the Court saw deportation as a kind of hybrid, a different animal that challenged the traditional dichotomy.[10] The Court's difficulty in classifying deportation as "direct" or "collateral" led it to question whether the distinction had any place at all in Sixth Amendment jurisprudence, an issue that the "unique nature of deportation"[11] enabled the Court to defer.

The effects of *Padilla* have spread far beyond deportation. As the two dissenters predicted,[12] the decision immediately spurred analogous Sixth Amendment challenges—many of them successful—to the validity of guilty

4. *Id.* at 511–15.

5. *See generally* Rob A. Justman, *The Effects of AEDPA and IIRIRA on Ineffective Assistance of Counsel Claims for Failure to Advise Alien Defendants of Deportation Consequences of Pleading Guilty to an "Aggravated Felony,"* 2004 UTAH L. REV. 701 (2004). Lower courts were somewhat more receptive to claims based on erroneous advice than to those based on a failure to advise at all. *See, e.g.*, United States v. Del Rosario, 902 F.2d 55, 59 n.2 (D.C. Cir. 1990); *In re* Resendiz, 19 P.3d 1171, 1174 (Cal. 2001).

6. *Padilla*, 130 S. Ct. at 1482; *id.* at 1494 (Alito, J., concurring). To withdraw the plea, the defendant must also show prejudice in addition to deficient counsel. Strickland v. Washington, 466 U.S. 668, 692 (1984). Because that issue had not been litigated below, the Court remanded for a prejudice determination. *Padilla*, 130 S. Ct. at 1487.

7. *Id.* at 1486; *id.* at 1494 (Alito, J., concurring).

8. *Id.* at 1483 (majority opinion). Justice Alito and Chief Justice Roberts would have required disclosure that deportation was possible but no further advice concerning the likelihood or the specifics. *Id.* at 1494 (Alito, J., concurring).

9. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1892); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913).

10. *Padilla*, 130 S. Ct. at 1482.

11. *Id.* at 1481.

12. *Id.* at 1496 (Scalia, J., dissenting).

pleas that were entered after counsel's deficient advice concerning a wide range of other collateral consequences.[13] Developments are unfolding rapidly, and scholarly commentary has already begun to accumulate.[14]

While *Padilla* continues to inspire rapid-fire changes for deportation-related duties of criminal defense counsel, similar drama has been unfolding in the other immigration arena in which counsel's effectiveness is commonly contested—counsel's performance during the deportation proceedings themselves. Because deportation proceedings are not formally criminal, the Sixth Amendment is inapplicable.[15] Still, the Board of Immigration Appeals (hereinafter "B.I.A.") and the courts have long held that Fifth Amendment due process provides a right to counsel in deportation proceedings, albeit not necessarily at government expense.[16] Congress has given that right statutory recognition.[17] The B.I.A. and most courts have also assumed that the constitutional right to counsel implies a constitutional right to *effective* counsel, at least when the proceeding would otherwise be "fundamentally unfair."[18]

In 2009, however, Attorney General Mukasey, exercising his power to review decisions of the B.I.A.,[19] decided *Matter of Compean*.[20] He held that there is no due process or other constitutional right to the effective assistance of counsel in deportation proceedings,[21] although he did acknowledge the discretionary power of immigration adjudicators to reopen deportation

13. *See, e.g.*, Kimberly Atkins, *Defense Counsel's Duty to Warn About . . . Everything?:* 'Padilla' *Ruling by U.S. Supreme Court Extending Far Beyond Deportation Cases*, LAW. WKLY. USA, Nov. 8, 2010; *see also* Gabriel J. Chin & Margaret Colgate Love, *Status as Punishment: A Critical Guide to* Padilla v. Kentucky (Ariz. Legal Studies, Discussion Paper No. 10-21, 2010) (forecasting and praising the extension of *Padilla* to other contexts previously dismissed as collateral).

14. *See supra* note 13 and the other articles included in this publication; *see also* Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 675–78 (2011); Anita Ortiz Maddali, Padilla v. Kentucky*: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1 (2011).

15. *See In re* Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986).

16. *See, e.g.*, *id.*; Paul v. INS, 521 F.2d 194, 197–98 (5th Cir. 1975); *In re* Lozada, 19 I. & N. Dec. 637, 638 (B.I.A. 1988), *aff'd*, Lozada v. INS, 857 F.2d 10 (1st Cir. 1988).

17. 8 U.S.C. § 1229a(b)(4)(A) (2006); *id.* § 1362.

18. *See, e.g.*, *Lozada*, 19 I. & N. Dec. at 638; Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008); Aris v. Mukasey, 517 F.3d 595, 600–01 (2d Cir. 2008); Zeru v. Gonzales, 503 F.3d 59, 72 (1st Cir. 2007); Fadiga v. U.S. Att'y Gen., 488 F.3d 142, 155 (3d Cir. 2007); Sene v. Gonzales, 453 F.3d 383, 386 (6th Cir. 2006); Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1274 (11th Cir. 2005). Some have rejected such a right. *See, e.g.*, Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008); Afanwi v. Mukasey, 526 F.3d 788, 798–99 (4th Cir. 2008); Magala v. Gonzales, 434 F.3d 523, 525 (7th Cir. 2005).

19. 8 C.F.R. § 1003.1(h) (2009).

20. 24 I. & N. Dec. 710 (A.G. 2009), *vacated*, 25 I. & N. Dec. 1 (A.G. 2009).

21. *Id.* at 714.

proceedings upon a showing of "egregious" incompetence of counsel.[22] In addition, he imposed new substantive and procedural constraints on the adjudicators' discretion to reopen.[23] That decision was short-lived. Attorney General Holder vacated the decision later the same year, on grounds not relevant here, but declined to address the constitutional issue.[24]

The purpose of this Article is to link these two lines of cases. My thesis is that the logic of *Padilla*, quite apart from its sweeping implications for the constitutional duties of criminal defense counsel, also helps resolve the constitutional issue left unsettled by *Compean* and its overruling: Is there a constitutional right to the effective assistance of counsel in deportation proceedings?

This issue assumes heightened importance in an era in which annual removal proceedings now number in the hundreds of thousands.[25] The Justice Department's Executive Office for Immigration Review, the umbrella agency that houses the immigration judges who preside over removal proceedings,[26] reported that in 2008 approximately 42% of the respondents in those proceedings were represented by counsel.[27] In removal cases that involve asylum, roughly two-thirds of the applicants in fiscal year 1999 had managed to procure counsel.[28] As discussed further below,[29] representation by counsel greatly increases the respondent's chance of success, both generally[30] and in

22. *Id.* at 728.

23. *Id.* at 732–39.

24. Attorney General Holder felt that the rulemaking process would be a more appropriate vehicle for reevaluating the administrative framework previously in place. *In re* Compean, 25 I. & N. Dec. 1 (A.G. 2009). For some useful pre-*Padilla* commentary on *Compean* and its overruling, see Jean Pierre Espinoza, *Ineffective Assistance of Counsel in Removal Proceedings* – Matter of Compean *and the Fundamental Fairness Doctrine*, 22 FLA. J. INT'L L. 65 (2010); Aliza B. Kaplan, *A New Approach to Ineffective Assistance of Counsel in Removal Proceedings*, 62 RUTGERS L. REV. 345 (2010).

25. Over 318,000 removal proceedings were initiated in fiscal year 2010. U.S. DEP'T OF JUSTICE, FY 2010 STATISTICAL YEARBOOK C3 tbl.3 (2011), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf.

26. 8 C.F.R. §§ 1003.9(a), 1003.10(a) (2010).

27. *More Than Half of Immigration Respondents Without Work*, 85 INTERPRETER RELEASES 2445 (2008).

28. Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 772 tbl.7 (2002). "Affirmative" asylum applications are first adjudicated by the USCIS asylum officers, and the representation rates at those interviews are lower — 34% in fiscal year 1999. *Id.* at 770 tbl.6. Because this Article is concerned solely with representation in removal proceedings, those data are less relevant, even though more than 80% of all the asylum claims filed in removal proceedings during the period studied originated in the USCIS asylum offices. *Id.* at 742.

29. *See infra* notes 51–53 and accompanying text.

30. Donald Kerwin, *Charitable Legal Programs for Immigrants: What They Do, Why They Matter and How They Can Be Expanded*, IMMIGR. BRIEFINGS, June 2004, at 6.

asylum cases.[31] There would be little reason to expect such a correlation unless the representation is at least minimally effective. Sadly, it often is not.[32]

Since even Attorney General Mukasey's opinion in *Compean* recognized the discretionary power of immigration adjudicators to reopen deportation proceedings in cases of ineffective assistance,[33] one might ask why it matters whether the ineffective assistance claim in deportation proceedings is of constitutional stature. There are several reasons. First, the governing statute recognizes a right to counsel in deportation proceedings but does not speak explicitly to whether that right encompasses *effective* assistance.[34] It was that ambiguity that left Attorney General Mukasey free to define the statutory power of adjudicators to redress ineffective assistance as narrowly as he wished. And if *Compean* is any indication, his wish was to define that power narrowly indeed.[35] The scope of the adjudicators' authority can thus swing back and forth each time the Administration changes hands—precisely the scenario illustrated by the *Compean* decision and its subsequent overruling. Second, without constitutional constraints, Congress itself could define the prerequisites to ineffective assistance claims in such narrow terms that very few errors by counsel would be cognizable. Alternatively, Congress could explicitly provide that any claim of ineffective assistance rests solely on the power of the Attorney General to set the parameters and the discretion of the adjudicators to apply them. More radically still, Congress could entirely bar motions to reopen deportation proceedings based on claims of ineffective assistance. Constitutionalizing the right to effective assistance in deportation proceedings thus insulates the right itself from shifting political winds in an increasingly inflammatory environment. It also ensures a meaningful judicial role in reviewing any substantive or procedural prerequisites that Congress, the Attorney General, or the immigration adjudicators should choose to impose.

Section I of this Article suggests that Attorney General Mukasey's conclusions in *Compean* rested on shaky ground even before *Padilla*. Section II considers the pre-*Padilla* evolution of the theory that deportation is not punishment. In Section III, I argue that *Padilla* now offers support for recognizing a due process right to the effective assistance of counsel in deportation cases.

31. Schoenholtz & Jacobs, *supra* note 28, at 743–45.

32. *See In re* Compean, 24 I. & N. Dec. 710, 728 (A.G. 2009) (citing judicial commentary on lapses by attorneys representing noncitizens in removal proceedings), *vacated*, 25 I. & N. Dec. 1 (A.G. 2009).

33. *Id.* at 739–41.

34. 8 U.S.C. § 1229a(b)(4)(A) (2006).

35. *See infra* note 41.

I. *COMPEAN* BEFORE *PADILLA*

Attorney General Mukasey's decision in *Matter of Compean* consolidated three cases.[36] In each, an undocumented immigrant had appealed the B.I.A.'s refusal to reopen removal proceedings.[37] Each argued ineffective assistance of retained counsel in connection with their applications for affirmative relief from removal.[38] Disapproving two earlier B.I.A. precedents, the Attorney General announced that there was no Fifth Amendment due process right to the effective assistance of counsel in removal proceedings.[39] Nor, he added, is there a *statutory* right to effective assistance in those proceedings.[40] He acknowledged that immigration judges and the B.I.A. have the discretion to reopen removal proceedings and that the "deficient performance" of counsel is a permissible ground for exercising that discretion, but even as to that, he imposed new and more demanding substantive and procedural prerequisites to doing so.[41]

Even before *Padilla*, Attorney General Mukasey's conclusion that the Constitution provides no right to the effective assistance of counsel in deportation proceedings rested on some thin reeds. Two broad themes can be distilled from *Compean*. The dominant theme was that the absence of a constitutional right to the *effective* assistance of counsel somehow follows from the absence of a right, in deportation proceedings, of *government-appointed* counsel. Surely, this is a non sequitur. Let us assume arguendo that Congress can constitutionally deny appointed counsel in deportation

36. 24 I. & N. Dec. 710.

37. *Id.* at 714–16.

38. *Id.*

39. *Id.* at 727.

40. *Id.*

41. Substantively, counsel's error must be "egregious"; the motion to reopen must have been filed within the relevant time limits unless the movant can show due diligence in discovering and seeking to cure counsel's errors; and the movant must establish that the lawyer's shortcomings prejudiced the outcome. *Id.* at 732–33. The prejudice standard, the Attorney General held, requires a showing that but for the errors of counsel, the movant "more likely than not" would have been "entitled to the ultimate relief he was seeking." *Id.* at 734. Procedurally, the movant must submit a detailed affidavit setting out all the relevant facts, including the lawyer's deficiencies and the harm they caused. *Id.* at 735. In addition, the movant must submit five documents: (1) a copy of the attorney-client agreement or a statement in the affidavit describing what the lawyer had agreed to do; (2) a letter to former counsel setting out the alleged deficiencies and counsel's reply, if there was one; (3) a completed and signed (but not necessarily filed) complaint to the appropriate disciplinary authority; (4) a copy of the evidence or arguments that the movant faults counsel for failing to offer; and (5) a signed statement by the current attorney (if there is one) stating his or her belief that former counsel's performance fell below minimal professional standards. *Id.* at 736–39 (modifying the various requirements from criteria previously announced by the B.I.A. in *In re Lozada*).

proceedings.[42] Why should the fact that the government is not obligated to appoint counsel mean that those noncitizens who obtain private counsel without the government's help have no right to effective assistance? Perhaps Attorney General Mukasey thought it unfair that those wealthy enough to afford private counsel would thus acquire a constitutional right unavailable to the indigent. But the question is not one of differential treatment. It is simply the reality that the effective assistance issue does not arise in pro se cases.

A separate theme of the Mukasey opinion appears to be that, for due process purposes, the actions of private counsel are not government action. For this line of argument, the Attorney General relied on dictum in *Shelley v. Kraemer* to the effect that due process does not apply to private conduct.[43] Indeed it does not, but more than private conduct is involved here, and on that score *Shelley* is a surprising choice of cases. That eminent decision is best known for its holding that the use of *the courts* to enforce a racially discriminatory land covenant would qualify as state action.[44] In the present context, the use of the immigration court and the B.I.A. to effect a deportation resulting from the ineffective assistance of counsel would similarly be state action.[45] If that state action renders the proceeding fundamentally unfair—a question of fact—then due process should be held to have been violated.

Those two themes—the absence of a right to appointed counsel and the absence of government action—are not entirely independent of one another. If there were a due process right to appointed counsel in removal proceedings and the government were to deny the respondent that right, then perhaps one could impute privately retained counsel's ineffective assistance to the government, thus supplying the government action essential to a due process claim. But the converse does not follow. As *Shelley v. Kraemer* illustrates, the judgment of a court can supply the requisite state action whether or not the government was constitutionally required to appoint counsel in the first place.

In *Mathews v. Eldridge*, the Supreme Court laid out the factors that courts must generally weigh in determining whether due process requires a particular procedural safeguard in an administrative adjudication:

42. In some non-criminal contexts, there is a constitutional right to government-appointed counsel. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778 (1973) (requiring appointed counsel in proceedings to revoke parole); *In re* Gault, 387 U.S. 1 (1967) (requiring appointment of counsel in juvenile delinquency proceedings).

43. *Compean*, 24 I. & N. Dec. at 717 (citing Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

44. *Shelley*, 334 U.S. at 20.

45. Professor Kaplan makes a similar point, observing that in criminal cases the private status of retained counsel has not prevented the courts from finding state action for purposes of ineffective assistance claims. Kaplan, *supra* note 24, at 358. Those decisions cannot be distinguished on the basis that the Sixth Amendment provides a right to counsel in criminal cases, because, as she notes, the right to effective assistance of retained counsel in (state) criminal prosecutions has also been grounded in due process. *Id.* at 358–59.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[46]

The nature and magnitude of the private interests at stake in deportation cases will vary with the circumstances of the respondent. Variables might include the person's immigration status—lawful permanent resident, lawfully present nonimmigrant, other miscellaneous lawful status, or undocumented—as well as personal circumstances, such as the duration of the person's presence in the United States, employment or other financial implications of deportation, and family and community ties to both the United States and the country of origin. There is no question, however, that the *potential* severity of deportation is extremely high, a point that the Court highlighted in *Padilla*.[47] And when the individual is applying for asylum or for relief under the Convention Against Torture, an erroneous rejection can result in persecution[48] or torture.[49]

The second *Mathews* factor is the value of the particular procedural ingredient, in this case the effective assistance of counsel, in preventing the erroneous deprivation of that private interest.[50] As an empirical matter, there is today no doubt that representation by counsel correlates positively with respondents' likelihood of success in removal proceedings generally[51] and in asylum cases specifically.[52]

Admittedly, correlation alone does not prove causation. It might well be, for example, that those noncitizens whose cases are not reasonably "winnable" are less likely to seek counsel or that counsel are less willing to take on such cases. It is entirely possible, therefore, that the higher success rates for represented respondents can be partly attributed to the strength of their claims.

46. 424 U.S. 319, 335 (1976).

47. 130 S. Ct. 1473, 1486 (2010).

48. 8 U.S.C. § 1101(a)(42) (2006) (basing "refugee" status on "persecution"); *id.* § 1158(b)(1)(A) (requiring "refugee" status for asylum).

49. Convention Against Torture and Other Cruel, arts. 1 & 3, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108. Stat. 392, 1465 U.N.T.S. 85 (defining "torture" and prohibiting return of a person to a State "where there are substantial grounds for believing that he would be in danger of being subjected to torture"); *see also* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No.105-277, § 2242(a), 112 Stat. 2681, 822 (stating analogous U.S. policy).

50. 424 U.S. at 335.

51. Kerwin, *supra* note 30, at 6.

52. Schoenholtz & Jacobs, *supra* note 28, at 743–45.

Even if one assumes a biased sample, however, it would be surprising if, on average, representation by counsel did not enhance the respondent's chances of winning a meritorious case. Counsel can do many things that lay respondents will ordinarily be ill equipped to do without help or advice. On questions of fact, counsel can glean the relevant information from the client, further investigate the facts before the hearing, assemble documents, line up witnesses, and cross-examine opposing witnesses. A respondent might be more willing to confide relevant facts to his or her counsel than to the adjudicator who would decide the case. Immigration law is highly complex; counsel will be far more likely than a lay person—particularly a lay person whose foreign origins leave him or her less familiar with American law, American culture, and even the English language—to understand the relevant law. Counsel will be better situated to spot issues, identify possible affirmative remedies and other defenses, research the law, have a sense of which defenses were successful in previous cases, and present the arguments in an orderly and convincing fashion. If the respondent is applying for asylum, counsel will be able to identify and assemble the meticulous documentation essential to establishing a claim of persecution. Counsel will know when it makes sense to appeal and when it makes sense to move to reopen or reconsider. Moreover, the government will always be represented by a specialized attorney whenever removability is contested;[53] the unrepresented respondent will therefore be at a keen, arguably unfair, disadvantage.

Thus, there are several ways in which counsel can protect the respondent's legitimate interests. Each of those benefits is ephemeral, however, if counsel is incompetent—i.e., if counsel fails to provide effective assistance. Ineffective assistance might even be worse than no counsel at all. When a noncitizen is unrepresented, the immigration judge might feel a greater obligation to identify possible avenues of relief or to ask relevant questions that might put the alleged grounds for deportation in doubt. In asylum cases, a pro se applicant might be unfamiliar with the legal elements essential to relief and thus unable to appreciate what evidence will be necessary to substantiate the claim. A conscientious adjudicator can ask the relevant questions.

The final *Mathews* factor is the government's interest in dispensing with the particular procedural ingredient.[54] Here, the issue is *not* whether the government has an interest in declining to provide counsel at public expense. Rather, the government's interest is in not insisting that the respondent's privately retained counsel render effective assistance. That interest is not trivial. As Attorney General Mukasey observed in *Compean*, granting a motion to reopen removal proceedings on the ground that counsel's assistance

53. 8 C.F.R. §§ 1240.2(b), 1240.10(d) (2010).

54. *Mathews*, 424 U.S. at 335.

was ineffective delays the ultimate resolution of the case;[55] moreover, even meritless motions to reopen burden the adjudication system. As Attorney General Mukasey emphasized, these considerations take on added weight in the light of respondents' inherent incentives to delay the completion of deportation proceedings in order to prolong their stays in the United States.[56]

But these are not the only public interests at stake. First, as Attorney General Mukasey acknowledged, the public also has an interest in assuring "the fairness and accuracy of removal proceedings."[57] Second, the immigration judges prefer that respondents be represented by counsel because counsel can present the cases both more effectively and more efficiently, and respondents who are represented by counsel are more likely to appear for their hearings.[58] Again, these benefits to the government depend on counsel being effective.

There are major flaws, then, in both the reasons offered in *Compean* for rejecting a constitutional right to the effective assistance of counsel in deportation proceedings and in the unacknowledged practical consequences to which that conclusion leads. In *Padilla*, the Supreme Court supplied positive ammunition for the recognition of a constitutional right to the effective assistance of counsel in deportation proceedings. To understand why this is so, one must consider how the Court's conception of deportation has now fundamentally changed.

II. THE CHARACTER OF DEPORTATION

The idea that deportation is not punishment originated with the Supreme Court's 1893 decision in *Fong Yue Ting v. United States*.[59] The case is best known both for being the first to recognize a congressional power to deport noncitizens and for apparently disclaiming any judicial authority to impose due process limits on Congress's exercise of that power.[60] In the same case, the Court set another process in motion — one that would ultimately preclude the application of several important constitutional rights to noncitizens in deportation proceedings. The Court declared that deportation is not a form of punishment.[61] Its sole rationale for that conclusion read as follows:

55. 24 I. & N. Dec. 710, 730 (A.G. 2009), *vacated*, 25 I. & N. Dec. 1 (A.G. 2009).

56. *Id.* at 729.

57. *Id.* at 728.

58. Schoenholtz & Jacobs, *supra* note 28, at 746.

59. 149 U.S. 698, 730 (1893). The evolution of the idea that deportation is not punishment is laid out in more detail in STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 208–09 (1987).

60. The latter aspect of *Fong Yue Ting* is no longer good law. It is now well-settled that procedural due process constraints apply in deportation proceedings. *See, e.g.*, Wong Yang Sung v. McGrath, 339 U.S. 33, 50–51 (1950); Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903).

61. *Fong Yue Ting*, 149 U.S. at 730.

> [A deportation proceeding] is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment . . . of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend.[62]

That description did not adequately distinguish deportation from criminal punishment, because an analogous description might well be offered for incarceration—probably the clearest form of criminal punishment. One can scarcely imagine the Court suggesting that a criminal sentence of incarceration is not punishment because "[i]t is but a method of enforcing [the transfer to a detention facility of a person] who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside [in society] shall depend."[63] The Court's conclusion that deportation is non-punitive seems more definitional than substantive.

The Supreme Court continued in the same vein in *Bugajewitz v. Adams*.[64] There it rejected a noncitizen's argument that the Ex Post Facto Clause prohibits Congress from prescribing deportation retroactively—i.e., when the conduct had not been a basis for deportation at the time the conduct occurred.[65] The Court had previously interpreted the Ex Post Facto Clause as applicable only to criminal punishment.[66] In *Bugajewitz*, the Court dismissed the ex post facto challenge by labeling deportation non-punitive.[67] In support of its finding, the Court simply said that deportation is merely "a refusal by the government to harbor persons whom it does not want."[68] That rationale likewise does little to distinguish deportation from criminal incarceration because one central purpose of the latter is, similarly, to isolate an undesirable person from society.

62. *Id.* The Court declared that a deported alien "has not, therefore, been deprived of life, liberty, or property, without due process of law." *Id.* This secondary conclusion is puzzling because the characterization of a particular consequence as punishment is not now, e.g., Mathews v. Eldridge, 424 U.S. 319, 348 (1976); Goldberg v. Kelly, 397 U.S. 254, 270 (1970), and was not even then, e.g., Windsor v. McVeigh, 93 U.S. 274, 277–78 (1876); Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863), essential to a due process claim.

63. *Fong Yue Ting*, 149 U.S. at 730.

64. 228 U.S. 585, 591 (1913).

65. *Id.* 590–91.

66. Calder v. Bull, 3 U.S. (1 Dall.) 386, 390 (1798).

67. 228 U.S. at 591.

68. *Id.*

From those two early decisions until *Padilla*, the Supreme Court strictly adhered to the mantra that deportation is not punishment.[69] In doing so, it added no substantive rationales to the definitional offerings of *Fong Yue Ting* and *Bugajewitz*. In case after case, the Court was content simply to cite what by then had become a mountain of precedent.[70] The case law accumulated.

III. *COMPEAN* AFTER *PADILLA*

Then came *Padilla*.[71] Padilla, a lawful permanent resident of the United States, pleaded guilty in state court to transportation of marijuana.[72] The resulting conviction gave rise to removal proceedings.[73] Padilla requested post-conviction relief on Sixth Amendment grounds of ineffective assistance of counsel.[74] He alleged that his criminal defense attorney had wrongly advised him that pleading guilty would not lead to deportation and that he would not have pleaded guilty had he received accurate advice.[75] The question before the Court was the scope of criminal defense counsel's Sixth Amendment duties concerning advice about the potential deportation consequences of their clients' guilty pleas.[76]

As noted earlier, pre-*Padilla* lower courts had divided over that question.[77] Driven by the Supreme Court's consistent pronouncements that deportation is not punishment, the lower courts had routinely classified deportation as a purely "collateral" matter rather than a "direct" consequence of a criminal conviction.[78] For that reason, absent legislation to the contrary, the lower courts had generally held that the criminal trial judge has no duty to advise the defendant of the potential deportation consequences before accepting a guilty

69. *See, e.g.*, Lapina v. Williams, 232 U.S. 78, 88 (1914); Lewis v. Frick, 233 U.S. 291, 296 (1914); Ng Fung Ho v. White, 259 U.S. 276, 280 (1922); Mahler v. Eby, 264 U.S. 32, 39 (1924); United States *ex rel.* Eichenlaub v. Shaughnessy, 338 U.S. 521, 529 n.15 (1950); Harisiades v. Shaughnessy, 342 U.S. 580, 594–95 (1952); Galvan v. Press, 347 U.S. 522, 531 (1954); Marcello v. Bonds, 349 U.S. 302, 314 (1955); Lehmann v. United States *ex rel.* Carson, 353 U.S. 685, 690 n.4 (1957); Mulcahey v. Catalanotte, 353 U.S. 692, 694 n.5 (1957).

70. *See* cases cited *supra* note 69.

71. 130 S. Ct. 1473 (2010).

72. *Id.* at 1477.

73. *Id.* at 1478.

74. *Id.*

75. *Id.*

76. *Id.*

77. *See supra* note 5 and accompanying text.

78. *E.g.*, El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002); United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993) ("We are not aware of any court that has held to the contrary."); Varela v. Kaiser, 976 F.2d 1357, 1358 (10th Cir. 1992) (citing a variety of cases from other circuits that have also reached the conclusion that deportation is a collateral consequence).

plea.[79] The Sixth Amendment duties of defense counsel presented a different question.

By a vote of 7-2, the Supreme Court held in *Padilla* that, for Sixth Amendment purposes, defense counsel has both an affirmative duty to advise a noncitizen defendant that a guilty plea *might* lead to deportation and the duty to avoid mistaken advice on that subject.[80] A smaller majority of five Justices requires counsel to elaborate further when the deportation consequence is "truly clear," as it was in *Padilla*.[81]

To reach those results, the Court had to rethink traditional judicial assumptions about the nature of deportation. Its thinking is encapsulated in the following excerpt:

> We have long recognized that deportation is a particularly severe "penalty," but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.
>
> Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.[82]

Thus, in one quick stroke, the Court relegated to the dustbin the long line of musty cases that had dismissed constitutional challenges to deportation orders simply by intoning that deportation is not punishment. For the first time, the Court opted for a functional approach that rests on reality rather than legal fiction. It felt no need to classify deportation as civil or criminal or to classify its consequences as collateral or direct. In effect, the Court held deportation was neither fish nor fowl. It has the feel and some of the attributes of a civil regulatory model,[83] but it is also very closely linked to the criminal process in ways that the Court spelled out in detail.[84] The Court thereby

79. *See* People v. Pozo, 746 P.2d 523, 526 (Colo. 1987) (offering long string citation of cases rejecting trial judge duty to advise of risk of deportation before accepting guilty plea).

80. 130 S. Ct. at 1486; *id.* at 1494 (Alito, J., concurring).

81. *Id.* at 1483 (majority opinion).

82. *Id.* at 1481–82 (citations omitted).

83. For the differences between the civil regulatory model and the criminal justice model, see Legomsky, *supra* note 3, at 474–75.

84. *Padilla*, 130 S. Ct. at 1482.

concluded that deportation occupies a middle ground situated somewhere between a civil penalty and a criminal punishment.[85]

But what about those deportation proceedings in which the charge does not rest on a criminal conviction? Noncitizens are routinely removed from the United States because of their unlawful presence[86] or any number of other grounds.[87] The Court's emphasis was on the close link between a criminal conviction and the deportation order that it triggers.[88] That theory for characterizing deportation as a kind of civil-criminal hybrid does not readily carry over to deportation proceedings that are not grounded on criminal convictions.

There was, however, another key element of the Court's rationale. After exploring the inseparability of deportation from the criminal conviction that precedes it, the Court added: "The severity of deportation—'the equivalent of banishment or exile'—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation."[89] It was not just the nature of deportation, then, but the severity as well which influenced the Court to conceptualize deportation as a penalty that defies clear categorization as civil or criminal. That functional approach has historical echoes,[90] reflects the reality of the legal world in which deportations are carried out, and applies with equal force to deportations not predicated upon criminal convictions.

Severity alone, of course, does not make a consequence punishment. An automobile accident can cause death, but that fact alone does not make such accidents punitive. More is necessary. In the case of deportation, two other

85. *Id.*

86. *See, e.g.*, 8 U.S.C. § 1182(a)(6)(A) (2006) (present without having been admitted); *id.* § 1227(a)(1)(B) (present in violation of law); *id.* § 1227(a)(1)(C)(i) (noncompliance with terms of nonimmigrant status).

87. *See, e.g.*, *id.* § 1182(a) (listing grounds of inadmissibility); *id.* § 1227(a) (listing grounds of deportability).

88. *Padilla*, 130 S. Ct. at 1481–82.

89. *Id.* at 1486 (quoting Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947)).

90. *See* James Madison, *Madison's Report on the Virginia Resolutions*, *in* 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 546, 555 (1836) ("[I]t can never be admitted that the removal of aliens, authorized by the [Aliens Act], is to be considered, not as punishment for an offence, but as a measure of precaution and prevention. . . . [I]f a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."); *see also* Galvan v. Press, 347 U.S. 522, 533 (1954) (Black, J., dissenting) ("[A deported person] loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country."); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) ("[Deportation] may result also in loss of both property and life, or of all that makes life worth living."); Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land is punishment . . . .").

elements are present. One is historical. As others have shown, banishment has been a common form of criminal punishment from ancient times through at least the nineteenth century.[91]

Second, the core objectives of deportation overlap substantially, if not fully, with those of the criminal justice system. I first offered that argument as a student many years ago,[92] and I excavate it here because the Court's decision in *Padilla* gives it contemporary traction. The premise will be that if constitutional consequences are going to turn on their classification as punishment, then the classification should reflect the underlying reasons for prescribing those consequences in the first place. The Supreme Court has proceeded from that premise in several contexts, including the citizenship context.[93]

With that premise, the arguments that I set out in the 1977 student piece can be summarized briefly: the purposes of deportation bear a striking resemblance to those of criminal punishment. One traditional purpose of criminal punishment is incapacitation—isolating an offender from society.[94] As discussed earlier, the same can be said of the purpose associated with deportation—ridding society of a person whose presence in the general population is undesirable.[95] Other traditional purposes of punishment are specific and general deterrence—discouraging wrongdoers from repeating deviant behavior and discouraging others from emulating that behavior.[96] Deportation could similarly be seen as a vehicle for deterring both the particular individual and others from future similar acts. The one, admittedly important, element of criminal punishment that does not correlate with

91. *See, e.g.*, Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115 (1999); Stephen H. Legomsky, Note, *Deportation of an Alien for a Marijuana Conviction Can Constitute Cruel and Unusual Punishment:* Lieggi v. United States Immigration and Naturalization Service, 13 SAN DIEGO L. REV. 454, 458 (1976); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 320–27 (2008).

92. *See* Stephen H. Legomsky, *The Alien Criminal Defendant: Sentencing Considerations*, 15 SAN DIEGO L. REV. 105, 121–27 (1977) (correlating the theories, justifications, and consequences of deportation with those of criminal punishment).

93. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion) (examining whether statutes that purported to take away U.S. citizenship shared the same purposes as criminal punishment). In applying the constitutional prohibitions of ex post facto laws and bills of attainder, both clauses that had been interpreted as limited to punishment, the Supreme Court has similarly classified certain formally civil sanctions as criminal punishment. *See* United States v. Lovett, 328 U.S. 303 (1946); Cummings v. Missouri, 71 U.S. (1 Wall.) 277 (1866).

94. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70 (2005).

95. *See* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913).

96. Frase, *supra* note 94, at 70–71.

deportation quite so precisely is retribution. Even as to that, however, deportations that are based on the commission of wrongful acts (and that description could embrace not only post-entry criminal conduct but also illegal entry and even knowingly overstaying a temporary visa) could well be seen as retributive.[97]

Thus, while the Court in *Padilla* emphasized the functional links between deportation and criminal justice, the compelling similarities in the objectives of the two systems reinforce the Court's characterization of deportation as a civil-criminal hybrid. That characterization, in turn, further strengthens the case for a constitutional right to the effective assistance of counsel. The same factors that necessitate such a right in criminal cases suggest a similar result in a setting that bears so many functional similarities to the criminal justice system.

I do not invoke the Sixth Amendment as the source of that constitutional right. The Sixth Amendment is, after all, expressly limited to "criminal prosecutions,"[98] and even the Supreme Court in *Padilla* depicted deportation proceedings only as a criminal-civil hybrid,[99] not a subspecies of criminal proceedings. Nor do my 1977 arguments demonstrate complete congruence between the goals of deportation and criminal justice; they suggest only a close resemblance. The retribution rationale of criminal punishment applies more clearly to traditional criminal prosecutions than to the deportation sanction. Rather, my view is that the constitutional right to the effective assistance of counsel in deportation proceedings is rooted in due process, supported by sound logic, and now rejuvenated by the persuasive functionality of the Supreme Court's decision in *Padilla*.

One final counter-argument might be anticipated. The constitutional right recognized in *Padilla* was a component of a fair procedure in a *criminal* case. One might reject the extension of that rationale to deportation proceedings, whatever similarities they might bear to criminal proceedings, not because of an increasingly unhelpful distinction between the civil and criminal labels, but because of the distinction between *administrative* and criminal penalties. The latter differential, the argument might run, reflects the long-recognized unique nature of the criminal sanction. Understandably, the courts have sought to ensure that the severe consequences of a criminal conviction—the loss of liberty, the permanent stigma, and all the possible civil disabilities—are not

97. *See also* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1898 (2000) (arguing that deportation orders based on post-conviction conduct are punitive in nature); Markowitz, *supra* note 91 (correlating the exclusion/deportation distinction with the civil/criminal distinction).

98. U.S. CONST. amend. VI.

99. 130 S. Ct. 1473, 1481 (2010).

inflicted unless the procedures leave us sufficiently confident that the person is in fact guilty.

My answer is that that rationale for special procedural safeguards in criminal cases—a rationale I do not question—has nothing to do with the result in *Padilla*. The Court's reasoning rested neither on the guilt or innocence of the accused nor on the inherent severity of a criminal conviction. It had everything to do with the nature and severity of deportation. If deportation is both so punitive and so serious a consequence that counsel's failure to advise about it in a criminal proceeding warrants withdrawal of a guilty plea, then a fortiori it would seem both punitive enough and serious enough to require some threshold level of effectiveness in the deportation proceeding itself.

CONCLUSION

The Supreme Court's decision in *Padilla v. Kentucky* would have been noteworthy even if the Court had done nothing more than require criminal defense counsel to advise their noncitizen clients about the possibility of deportation. That step alone would have been a giant leap forward in an area increasingly suffocated by formalities at odds with the reality of deportation. But the Court in fact did much more—more than even opening the door to the likelihood of similarly requiring advice concerning collateral consequences beyond deportation. By abandoning the strict civil-criminal dichotomy that had isolated deportation from its criminal cousins and accepting a functional approach that recognized the close resemblance between these two interrelated legal regimes, the Supreme Court laid the logical foundation for resolving the constitutional issue raised in *Compean*. The case for a constitutional right to the effective assistance of counsel in the deportation proceedings themselves was strong even before *Padilla*. It is now compelling.